84-1029

FILED
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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JUAN INOSENCIO, et al., Petitioners, vs. PERRY JOHNSON, et al., Respondents.	)	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can the the State of Michigan prohibit congregate worship services by one specified religious denomination, in Michigan's prisons, while permitting congregate worship services by other religious denominations, merely because the banned denomination does not condemn homosexuality?

II. In light of California's experience of seven years of in-prison congregate worship services by Metropolitan Community Church, without problems, is Michigan's total ban on those same in-prison services an exaggerated response to perceived security conditions?

III. Does Michigan's blanket prohibition of in-prison congregate worship services by one denomination (Metropolitan Community Church), while permitting such services by other denominations, consti-

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ate State preference of religion, violating the Establishment clause of the Fourteenth Amendment?

IV. Does Michigan's blanket prohibition of in-prison congregate worship services by one denomination (Metropolitan Community Church), while permitting such services by other denominations violate the Equal Protection clause of the Fourteenth Amendment?

V. Does Michigan's blanket prohibition (set forth above) violate the inmate-petitioners' rights to Free Exercise of Religion guaranteed by the First Amendment?

VI. Does the decision of the Court of Appeals, affirming a total ban on in-prison congregate worship services by one denomination (Metropolitan Community Church), result from a failure to use a proper balancing test (balancing alleged compelling security interests against First and Fourteenth Amendment protection

of religious activity), and thereby allow an exaggerated response to perceived security conditions?

PARTIES

The parties to the proceedings in the Court of Appeals, were appellants and plaintiffs:

> JUAN INOSENCIO, LaSALLE X. WASHINGTON, JOSEPH TRIPLETT, on behalf of themselves and all others similarly situated, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, DETROIT METROPOLITAN COMMUNITY CHURCH, REV. HEATHER ANDERSON, REV. NANCY WILSON, REV. TED L. RICHMOND, LEE OBERY, and REV. ROBERT ARTHUR.

These parties are the petitioners in this Court.

The Court of Appeals added a plaintiff, in the caption of its Opinion, who was not active in the appeal, apparently because that plaintiff's name was the first name on the District Court's Docket

Sheet; that plaintiff was KENNETH L. BROWN, but plaintiff BROWN was not involved in the case on appeal.

The defendants and appellees were:

> PERRY JOHNSON, Director, Michigan Department of Corrections, CHARLES ANDERSON, Warden, State Prison of Southern Michigan, their agents and employees, Jointly and Severally.

These parties are the respondents in this Court.

The Court of Appeals made CHARLES E. EGELER a party, again due to his position on the original District Court's Docket Sheet, but he had been replaced as the Warden for the state prison of Southern Michigan by the above-mentioned CHARLES ANDERSON.

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OFFICIAL REPORTS IN THIS CASE

The Opinion of the United States Court of Appeals for the Sixth Circuit, which is the subject of this Petition For Writ of Certiorari, has apparently not yet been published (but is set forth in the Appendix). It is numbered [82-1768 in that Court.

The Opinion of the United States District Court for the Eastern District of Michigan,* which was the subject of the appeal to the United States Court of Appeals for the Sixth Circuit, is published at 547 F.Supp. 130 (E.D. Mich. 1982). There is a prior opinion in this case, in the United States Court of Appeals for the Sixth Circuit reported at 658 F.2d 418 (6th Cir. 1981).

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* This Opinion is also found in the Appendix hereto.

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Sixth Circuit, which is the subject of this Petition for a Writ of Certiorari, was filed and entered September 11, 1984. The Supreme Court has jurisdiction to review that decision under the provisions of Title 28, United States Code Section 1254(1) and Section 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case rests upon the first two clauses of the First Amendment, and upon Section 1, of the Fourteenth Amendment to the Constitution of the United States. They are set forth as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The State of Michigan has determined that Metropolitan Community Church may not hold congregate worship services in Michigan's prisons. The State has made its determination based upon the fact that Metropolitan Community Church does not condemn homosexuality in contra-distinction with other churches, and also on the fact that Metropolitan Community Church has a special ministry to the spiritual and religious needs of homosexual persons.

The petitioners were plaintiffs in the United States District Court for the Eastern District of Michigan in an action asking for declaratory and injunctive relief against the total ban on in-prison congregate religious services by their Church.

In 1978, the District Court dismissed the action (with regard to the church and minister-plaintiffs) and granted summary judgment (against the prisoner plaintiffs). The plaintiffs appealed from that order, and the United States Court of Appeals for the Sixth Circuit reversed and remanded to give the plaintiffs "an opportunity to present evidence concerning the effect of the church's congregational services in prison and on the treatment of the church's ministers in prison." 658 F.2d at 419. (6th Cir. 1981.

The District Court held an

evidentiary hearing over six days in 1982. At the conclusion of this hearing, the District Court entered an "Order Granting Final Judgment to Defendants." (547 F.Supp. 130, set forth in the Appendix also). That Order was appealed to the United States Court of Appeals for the Sixth Circuit, and that Court of Appeals rendered the decision affirming the District Court's Order, and the Court of Appeals' decision is the subject of this Petition for Certiorari.

Federal jurisdiction was invoked, in the complaint in this action, under the Civil Rights Act of 1871 (Title 42, United States Code, Sections 1981, 1983, and 1985), and under the First and Fourteenth Amendments to the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

There are important reasons for

granting certiorari in this case. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. This is true because a special three-judge United States District Court for the Northern District of California has decided this matter in conflict with the decision of the United States Court of Appeals for the Sixth Circuit.[2]

The California decision was entered approximately seven years before the Michigan decision (which the Sixth Circuit Court of Appeals affirmed). The case is even more important, for decision by this Court,

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2 Lipp v. Procunier, 395 F.Supp. 871 (N.D. Cal. 1975) (three-judge court). Metropolitan Community Church has been holding services in California's prisons ever since, without any security problems.

because the seven years' experience in California makes the security considerations relied on in the Michigan decision, extremely suspect.

This case presents a stark example of disregard of the First Amendment's religious guarantees, because of the nature of the religious teaching involved. And in view of the seven (7) years of experience in California's prisons, the discrimination against Metropolitan Community Church, because of its religious doctrine, can hardly be said to rest on legitimate security considerations in Michigan's prisons. There does not seem to be any case which could be a clearer example of the kind of exaggerated and unjustified response, by prison authorities, to perceived security considerations, which Bell v. Wolfish[3] expressly excepted

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3 441 U.S. 520, 548, 551, 555, 561-562 (1979).

from the general rule that courts must defer to judgments of prison officials with regard to security considerations.

In the course of the evidentiary hearing in the District Court, the Director of Corrections of California testified that not only was the seven-year experience in California conclusive in her mind, that the Church's in-prison congregate services were no security problem, but also that the main opposition to the Church's in-prison services was undoubtedly political.[4]

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4 RE-CROSS-EXAMINATION OF THE CALIFORNIA DIRECTOR OF CORRECTIONS BY THE ASSISTANT ATTORNEY GENERAL OF MICHIGAN:

"Q Ms. Rushen, do I understand you correctly, that if there were not a court order in effect in California, that you would welcome the Metropolitan Community Church to San Quentin and Folsom?

A That was not the question. I

think the question, as I remember it, was: That is they made application to any of the other institutions --

Q Yes.

A Would they be permitted to have services? That answer is, yes.

Q Why is the answer, yes?

A Two reasons: One, of the court order, and one, experience has shown that it has not created a problem.

THE COURT: Let's forget about the court order. Suppose there was no court order requiring you to do this. Would you do it?

THE WITNESS: Well, your Honor, that's a very difficult question to --

THE COURT: But that's the question I am asking. Thank you for bringing this out. I misunderstood your response earlier.

You are saying that you permit the Metropolitan Community Church in all of the prisons because the court has ordered you to?

THE WITNESS: It's two reasons: Because the court left us an out.

The court says that if at any time we felt that it breached security of the institution, we would not have to do this.

THE COURT: But if the court had not been involved and you were free to act independent of any court-directed order, then you are not saying that you would grant permission, are you?

THE WITNESS: Your Honor, may I be permitted to answer that two ways, from my own personal philosophy and from the director's position? Two hats.

THE COURT: Yes.

THE WITNESS: Politically, I think we would have to consider the public attitude and all of that. So that I am not sure that I would do it without a court order.

From a philosophical point of view and the experience that I have had, I don't think it would create a problem. In fact, from 1975 we have had no problem.

But I want to be as honest as I can because I think we really have to understand that it's a highly political situation and I don't -- I really can't say whether I would do it without the court order. But we have had

no problems. And with the court order and with the discretion that I have, which would be not to have it in any institution that I feel would cause a problem, I would permit it in all twelve.

THE COURT: Anything else:

Q (by Ms. Fischhoff): You are saying you would have those reservations about allowing them to take place at Folsom or San Quentin?

A Right. In other words, I really hope I can make this plain.

Say this was a new situation, we didn't have a court order and the church was petitioning. Politically, I would have to take into some serious consideration whether I would voluntarily --

THE COURT: What do you think you would do?

THE WITNESS: I think your Honor --

THE COURT: If you were the Ayatollah?

THE WITNESS: I would do it, no question about it. If I were the Ayatollah and didn't have to answer to anybody, I would do it.

Now, I am also saying, however, that the court order came along before I was director. The court order left me an out. I could say, and probably prove at Folsom and San Quentin that I could make a case for breach of security, I believe. I think I could.

But I would not because I really feel that experience has shown that if you leave this alone, let the church in, they have been very responsible. They have not created any scenes and there is no one flocking there or anything like that. And after the first few months of curiosity, the inmate population settled down and it's really like any other religion.

Q So, basically, because the inmates -- if you have a low enough level of interest there are no problems associated with this church, correct? Isn't that true?

A There haven't been any problems associated with this church since 1975." [Reporter's Transcript II 36:14 through 40:1]

The first Metropolitan Community Church in-prison religious service was held in 1972. (Litigation followed, resulting in the vindication of the Church's rights to treatment equal to other denominations, in California's prisons.[5]) The same year that the first Metropolitan Community Church in-prison religious service took place in California, this Court decided Cruz v. Beto.[6] Cruz holds that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." 405 U.S. 322, fn. 2. Cruz is

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5 Lipp v. Procunier, supra.

6 405 U.S. 319 (1972).

the basic guide for prisoners' religious rights. Clearly, prisoners have the right to free exercise of religion, and there is a great burden placed upon Michigan to show why it can deny Metropolitan Community Church prisoner-adherents the right to exercise their religion in congregate worship services, when that State allows other denominations the right to exercise their religion in congregate worship services.[7]

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7 The Sixth Circuit has decided a number of cases, requiring a balancing test in removing rights of prisoners to practice their religious beliefs. See Weaver v. Jago, 675 F.2d 116 (6th Cir. 1982); Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981).

We submit that no balancing test is required in the decision of the Sixth Circuit in the case now at bench. Other federal courts require the same balancing test, see, e.g., Kennedy v. Meacham, 540 F.2d 1057 (10th Cir. 1976); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). District Courts have required the same tests: See Walker v. Johnson, 544 F.Supp. 345 (E.D.

Churches, and clergy, have a right (if they are requested to come into prisons by prisoners, to hold services for the prisoners) to be free from State preference of one denomination other another. O'Malley v. Brierley, 477 F.2d 785, 796 (2d Cir. 1973). Such State preference violates the Establishment clause, and that is exactly what Michigan has done in the case at bench.

Seven years of experience (at the time of the District Court's judgment in the case below, which was now two years ago) has shown clearly that Michigan's total ban on Metropolitan Community Church's religious services

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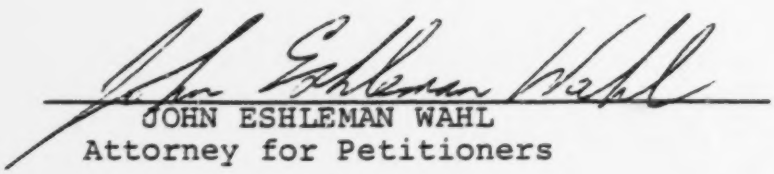
Mich. 1982); Moskowitz v. Wilkinson, 432 F.Supp. 947 (D. Conn. 1977); Monroe v. Bombard, 422 F. Supp. 211 (S.D. N.Y. 1976).

in the State's prisons, is an exaggerated and unjustified response to perceived prison conditions. Therefore, the conclusion is inevitable that the ban is based on political and philosophical objections to the teachings of the Church. As such, the ban must fall as repugnant in the extreme to the First and Fourteenth Amendments to the Constitution. Accordingly, it is respectfully requested that the Supreme Court grant its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and reverse the decision of that Court.

DATED: December 10, 1984.



JOHN ESHLEMAN WAHL
Attorney for Petitioners

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1768

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH L. BROWN,
Plaintiff,

JUAN INOSENCIO, ET AL.,
Plaintiffs-Appellants,

v.

PERRY JOHNSON and
CHARLES E. EGELER,
Defendants-Appellees,

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed September 11, 1984

Before: ENGEL and MARTIN, Circuit Judges; and WEICK, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. The issue presented here is whether state prison officials may prohibit inmates affiliated with the Universal Fellowship of Metropolitan Community Churches, a Christian church which has a special ministry to the spiritual and religious needs of homosexuals, from participating in group worship services within the prison, while permitting other churches to hold such worship services.

Plaintiffs, state prisoners, the Detroit Metropolitan Community Church and certain Church officials, appeal a decision of the district court finding that the defendants, prison officials at the Jackson State Prison for Southern Michigan, did not act unreasonably or overreact when it prohibited congregate worship services by the Church at the prison. *See Inosencio* v. *Johnson*, 547 F. Supp. 130 (E.D. Mich. 1982).

Prison officials recognized the Church as a bona fide religion in 1976. Following this recognition the prison officials have allowed the Church's minister to meet with inmates on an individual basis and to mail religious literature to them. Church officials have not, however, been permitted to conduct congregate worship services within the prison. Plaintiffs began this action in February 1977. They challenged the blanket prohibition against congregate worship services within the prison by the Church. The Church is a member of the Universal Fellowship of Metropolitan Community Church and differs from other Protestant churches principally in not condemning homosexuality. One of its purposes is to minister to the spiritual needs of homosexual persons in and out of prison; the Church, however, does not encourage homosexual behavior.

The plaintiffs initially argued that the prison's blanket prohibition against congregate worship services by the Church violated the first amendment because inmates of other faiths and their respective churches, which were not supportive of the spiritual needs of homosexual inmates, were permitted to conduct congregate worship services, while the plaintiffs were not. This claim was rejected by the district court.

After an appeal to this court, we remanded the district court's summary judgment order to allow plaintiffs "an opportunity to present evidence concerning the effect of the Church's congregational services in prison and on the treatment of the Church's ministers in prison." *Inosencio* v. *Johnson*, 658 F.2d 418, 419 (6th Cir. 1981). Following the

presentation of additional testimony, the district court again found for the defendants. This appeal followed.

Here, plaintiffs assert that the prison's blanket prohibition against the Church's holding congregate worship services violates their first amendment right to religious freedom. They also argue they were denied equal protection of the law because other inmates and churches were permitted to hold group worship services, while they were denied the same privilege. In considering these claims our starting point must be *Bell* v. *Wolfish*, 441 U.S. 520 (1979). In *Bell* the Court articulated four principles to consider when a challenged prison rule or regulation is attacked on constitutional grounds. First, it is clear that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Id.* at 545. *See also Wolfel* v. *Bates*, 707 F.2d 932, 934 (6th Cir. 1983) (per curiam) (prison administrators do not have "an overriding interest in the *indiscriminate* suppression of peacefully communicated inmate complaints") (emphasis in original). A prisoner retains those rights that are "not inconsistent with his status as a prisoner or with the legitimate penalogical objectives of the corrections system." *See Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). Second, merely because prisoners "retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.. . . There must be a 'mutual accommodation' between institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell* at 546, (quoting *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974)). *See also Meadows* v. *Hopkins*, 713 F.2d 206, 209-210 (6th Cir. 1983) (prison regulations infringing on inmates constitutional rights must be evaluated in light of the central objectives of prison administrators). Third, "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights" of convicted prisoners. *Bell*, 441 U.S. at 546. And finally, because the

daily operation of a correctional facility poses difficult and unique management problems, prison officials should be accorded substantial deference in the adoption and implementation of policies and practices that in "their judgment are needed to preserve internal order and discipline and to maintain institutional security. 'Such considerations are peculiarly within the province and professional expertise of correctional officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, court should ordinarily defer to their expert judgment in such matters.'" *Bell* at 547-48 (quoting *Pell* v. *Procunier*, 417 U.S. 822, 827 (1974)). Applying these principles, in *Bell* the Court found that a prison's prohibition against inmate receipt of hardback books not mailed directly from publishers did not violate the inmates' first amendment rights because the prohibition was a rational response to an obvious security problem, the rule was executed in a neutral fashion, and there were alternative means available for inmates to obtain reading material. *Bell*, 441 U.S. at 550-52.

Similarly, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), the Court held that neither the first amendment nor the equal protection clause were impermissibly infringed when state prison officials prohibited a prisoners' union from soliciting other inmates to join the union, barred all meetings of the union, and refused to deliver packets of union publications that had been mailed in bulk to several inmates for redistribution among other prisoners, even though similar privileges were extended to other organizations within the prison. Addressing the union's first amendment associational claims, the *Jones* Court noted that first amendment rights "may be curtailed whenever the institution's officials in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the *likelihood of disruption* to prison order or stability, or otherwise interfere with the legitimate

penalogical objectives of the prison environment." *Jones*, 443 U.S. at 132 (emphasis added). Regarding the union's equal protection challenge, the Court noted that prison authorities should be given the "full latitude of discretion" concerning "a decision as to which of many groups should be allowed to operate within the prison walls, . . . unless it can be firmly stated that the two groups are so similar that discretion has been abused." *Id.* at 136.

In *Weaver* v. *Jago*, 675 F.2d 116, 118 (6th Cir. 1982), and *Jihaad* v. *O'Brien*, 645 F.2d 556, 564 (6th Cir. 1981), we have interpreted the decisions in *Bell* and *Jones*, as well as *Pell* v. *Procunier*, 417 U.S. 817 (1974) (prison regulation prohibiting media interviews with specific individual inmates did not abridge inmates freedom of speech where alternative channels of communication available), to require that a court balance the competing interests at stake when a prisoner constitutionally challenges the validity of a specified prison rule. Although a prisoner "does not have an absolute right to practice his religion in accord with his desires," he is entitled to have a court balance his constitutional claims against legitimate state interests in operating its prisons. *Jihaad*, 645 F.2d at 564; *Weaver* v. *Jago*, 675 F.2d at 118.[1] *Accord Meadows* v. *Hopkins*, 713 F.2d at 210; *Thompson* v. *Commonwealth of Kentucky*, 712 F.2d 1078, 1080 (6th Cir. 1983).

Here, the district court was required to balance the needs of the prison authorities with internal security and inmate discipline against the right of the inmates and Church to exercise their religious freedom. Governmental interference with a prisoner's religious practices cannot be justified merely because a particular faith is sympathetic to the religious needs of

[1] This principle was reaffirmed in *Hudson* v. *Palmer*, —— U.S. ——, 104 S. Ct. 3194 (June 26, 1984), where the Court noted that prisoners "must be provided 'reasonable opportunities' to exercise their religious freedom guaranteed under the First Amendment." *Hudson*, —— U.S. at ——, 104 S. Ct. at 3198 (citing *Cruz* v. *Beto*, *supra*).

homosexuals. *Lipp* v. *Procunier*, 395 F. Supp. 871, 876 (N.D. Cal. 1975) (three-judge panel); *cf. Gay Students Org. of Univ. of New Hampshire* v. *Bonner*, 509 F.2d 652, 662 (1st Cir. 1975). "[R]easonable opportunities must be afforded to *all* prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (emphasis added). Where an inmate's religious freedom is at stake, correctional officials may only adopt regulations which are "reasonably and substantially" justified by official concern for internal security and inmate discipline. *Sweet* v. *South Carolina Dept. of Corrections*, 529 F.2d 584, 863 (4th Cir. 1975); *see also O'Malley* v. *Brierley*, 477 F.2d 785, 795-96 (3d Cir. 1973), "Prison restrictions that impinge upon a prisoner's First Amendment right must be carefully scrutinized to ascertain the extent to which they are necessary to effectuate the legitimate policies and goals of the corrections system." *Childs* v. *Duckworth*, 705 F.2d 915, 920 (7th Cir. 1983).

To support their claim that the prohibition against the Church's holding group worship services was substantially related to prison security, prison officials presented considerable testimony which indicated that a strong correlation existed between inmate homosexuality and prison violence. For example, officials testified that at least twenty-six incidents of serious violence involving homosexual relationships among the inmates had occurred between 1970 and 1976, including three homicides. Moreover, the district court noted testimony that stronger inmates have a tendency to engage in predatory homosexual behavior against weaker or effeminate prisoners. According to prison officials, this is done to establish a supremacy in the prison "pecking order" and works to diminish the general stability and discipline of inmate behavior needed to maintain internal order within the prison.

There was also testimony which demonstrated that widespread homosexuality within the prison played a major role in inmate assaults because of love triangles, jealousy among the

inmate population and other rivalries which grow out of various homosexual relationships. Often innocent inmates would become the victims of rapes, intimidation, extortion and personal abuse because of the substantial degree of homosexuality conducted within the prison. For these reasons, prison officials testified that they could not sanction an activity that might further expose innocent inmates, who might choose to attend the Church's group meetings, to violent and predatory prisoners. The officials conceded there was no security risk in the movement of prisoners to and from worship services. However, they claimed that permitting the Church's congregate worship services was unacceptable because it would increase the opportunities for identification of homosexual inmates and for contacts between dangerous inmates and individuals attending the services. Prison officials noted that under the existing conditions they can minimize the potential exposure of known homosexual inmates with more dangerous inmates. Without the challenged regulations, officials maintained that violent inmates would be provided an opportunity to identify potential victims who might otherwise escape the prison "grapevine" for identifying homosexuals.

Because of the undisputed testimony linking inmate homosexuality with prison violence, we are not in a position to say that the reasoning of the prison officials is without factual support. We believe the blanket ban against the holding of group worship services by the Church is reasonably related to the State's interest in maintaining internal security in the prison. Although the plaintiffs were forbidden to hold group services, individual counselling and religious ministry sessions were available for interested inmates and Church officials, indicating the prison officials' attempt to accommodate the plaintiffs' interests in religious freedom with the prison's interest in security and inmate discipline. A review of the record reveals that this alternative to the holding of congregate worship services was not an unreasonable nor exaggerated response to the threat perceived by prison administrators.

Thus, we will try not to second-guess prison administrators on matters relating to prison security, even when those matters affect the constitutional rights of inmates in a manner we find discomforting. *Bell*, 441 U.S. at 531; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. at 128; *Pell* v. *Procunier*, 417 U.S. at 827; *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974). As long as prison authorities present evidence to support their judgment that prison security will be undermined in the absence of a challenged regulation, we will not substitute our judgment for theirs. *See Otey* v. *Best*, 680 F.2d 1231, 1233 (8th Cir. 1982); *St. Clare* v. *Cuyler*, 634 F.2d 109, 114-15 (3d Cir. 1980).

On the equal protection claim, plaintiffs contend prison authorities acted impermissibly by allowing prisoners of other faiths and their respective churches to hold group worship services, while denying plaintiffs the same privilege. Undoubtedly, the prison's prohibition against the Church is a distinction among religious faiths that would be subject to question outside of the prison walls. *See Larson* v. *Valente*, 456 U.S. 228, 244-46 (1982); *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951). *Accord Lynch* v. *Donnelly*, — U.S. —, —, 104 S. Ct. 1355, 1359 (1984) (the Constitution "affirmatively mandates accommodation, and not merely tolerance, of all religions, and forbids, hostility toward any"). However, the distinction here is one among groups operating within a prison. In this context, decisions by prison administrators "as to which of many groups should be allowed to operate within the prison's walls" are matters within the discretion of prison officials to which the courts should ordinarily defer "unless it can be firmly stated that the two groups are so similar that discretion has been abused." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 136. Moreover, prison officials, when making these types of decisions, need not demonstrate an *actual* danger in order to support the reasonableness of their determinations. It is enough to

show that a *potential* danger exists without the restrictions of a challenged prison regulation. *See Bell*, 441 U.S. at 551 n.32; *Jones*, 433 U.S. at 133 n.9. Here, prison officials have sufficiently demonstrated differentiation between the Church and other churches presently permitted to hold group worship services. At the same time, prison officials have shown that this differentiation is tied to prison violence and internal disruption. Thus, their refusal to allow the plaintiffs to hold group worship services, while granting the privilege to other groups, does not constitute a violation of the equal protection clause of the fourteenth amendment. "There is nothing in the Constitution which requires prison officials to treat all inmate groups alike where differentiation is necessary to avoid an imminent threat of institutional disruption or violence." *Jones*, 433 U.S. at 136.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUAN INOSENCIO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 7-70377
	)	
PERRY JOHNSON, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING FINAL JUDGMENT TO DEFENDANTS

At a session of said Court held in the Federal Building at Detroit on the 15th day of September, 1982

PRESENT: HONORABLE JOHN FEIKENS
CHIEF UNITED STATES
DISTRICT JUDGE

For the reasons discussed in the accompanying opinion, final judgment is hereby awarded to the named defendants or those who may have assumed their positions within the Michigan Department of Corrections.

/s/ John Feikens
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUAN INOSENCIO, et al.,

Plaintiffs,

vs.

PERRY JOHNSON, et al.,

Defendants.

No. 7-70377

OPINION AND FINAL JUDGMENT

FEIKENS, Chief Judge

Plaintiffs are two groups united by their desire to see the Detroit Metropolitan Community Church (the Church) conduct congregate worship services at the State Prison for Southern Michigan at Jackson (the Prison or Jackson Prison). The Church is a member of the Universal

Fellowship of Metropolitan Community Churches and differs from other Protestant churches principally in not condemning homosexuality. One of its purposes is to minister to the spiritual needs of homosexual persons in and out of prison. The first group of plaintiffs is composed of a number of homosexual inmates at the Prison; the second includes the local officials of the Church and the Church itself.

Since 1976 the Prison has recognized the Church, and as a matter of policy has allowed its ministers to meet with inmates and mail literature into the Prison. The Prison has refused, however, to allow ministers of the Church to conduct congregate worship services; it does

allow miniters of other congregations to do this. Plaintiffs filed their original complaint in February of 1977[1] alleging that the

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[1] Plaintiffs later filed an amended complaint changing only the names of defendants who had been replaced in the Michigan Department of Corrections by defendants currently named. At least one of the named defendants, Barry Mintzes, has recently left the Department. Even though plaintiffs have not amended the complaint to reflect most recent changes, the final order accompanying this opinion will be addressed to whomever currently holds the appropriate positions of authority at the Prison.

Prison's decision to prohibit worship services violated the inmates' First Amendment right to the equal protection of the law. On behalf of the Church, the complaint also alleged that the Prison, contrary to its policy, treated the Church's ministers differently from ministers of other faiths by intercepting mail, harassing them, and not admitting them for visits as clergy.

After considering the motions of both sides for summary judgment and reading the many affidavits submitted by both sides, I found that the Prison had acted with sufficient reason in prohibiting group services, and I granted summary judgment to defendants on that issue. Because the Prison agreed to abide by its policy concerning the ministers,

the claims of the Church were left to be settled and the final order gave judgment on all issues to defendants.

Plaintiffs appealed that decision and the United States Court of Appeals for the Sixth Circuit reversed and remanded to give plaintiffs "an opportunity to present evidence concerning the effect of the Church's congregational services in prison and on the treatment of the Church's ministers in prison." Inosencio, et al. v. Johnson, et al., No. 79-1242 (6th Cir. July 21, 1981).

The parties have again settled the claims of the Church concerning unequal treatment.[2] They have also

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2 The role of the Church in this

litigation is not altogether clear. In most paragraphs of the complaint the term "plaintiffs" appears to refer only to the inmates. The Church does not seem to allege that its First Amendment rights are violated by the prohibition on services or that it has been denied the equal protection of the law in that regard. In any case it would appear plain that the Church and its ministers have no First Amendment right to preach in a non-public place such as a prison. Greer v. Spock, 424 U.S. 828, 838 (1976); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 134 (1976) (quoting Greer).

Furthermore, it is equally plain that because I find that the prisoners have not been deprived unconstitutionally of the equal protection of the law, a similar claim by the Church must also fail for the same reasons, namely, that there is a rational basis for treating the Church differently. Jones at 134 (following City of Charlotte v. Firefighters, 426 U.S. 283 (1976)).

The only grievance the Church puts forward is that its ministers are not being accorded the equal protection of the law since unlike ministers of other faiths,

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the are being harassed, their literature is intercepted, and they are not always allowed to visit in their capacity as ministers. This grievance, as the text describes, was settled between the parties and, therefore, the Church should no longer be involved in this suit. Nevertheless, it appears that it is the Church that is pursuing the litigation on behalf of the prisoners. No prisoner has ever appeared in this court, and no prisoner since 1977 has filed an affidavit or any other correspondence. Moreover, counsel for plaintiffs was obviously retained by the Church.

It is only because of the mandate of the Circuit Court that I have not inquired further into the participation of the prisoners in this suit and the standing of the Church to litigate on behalf of the prisoners.

taken advantage of the Circuit Court's remand and have presented considerable testimony for and against congregate worship at the Prison. After carefully considering the testimony of plaintiffs' witnesses on the effect of similar services in the California prisons and the testimony of Michigan prison officials, I again find that the Prison has acted reasonably and that defendants are, therefore, again entitled to judgment.

The facts of this case are very similar to those in a case the Supreme Court reviewed in 1977, Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977). I will briefly review the findings in that case since it and the few cases following

it articulate the applicable law in this case. In Jones, the North Carolina Department of Corrections prohibited a prisoners' union from meeting and distributing literature in bulk mailings. The union in that case, like the prisoners here, alleged that the decision infringed First Amendment rights, free speech and free association. Because the Prison allowed other groups to meet, the union also alleged that the decision deprived them of the equal protection of the laws guaranteed by the Fourteenth Amendment. The Corrections Department justified the prohibition arguing that "the existence of the Union will increase the burdens of administration and constitute a threat of essential disci-

pline and control. They [the department officials] are apprehensive that inmates may use the Unions to establish a power bloc within the inmate population which could be utilized to cause work slowdowns or stoppages or other undesirable concerted activity." Id, at 123 (quoting the opinion of the district court, 409 F.Supp., at 941).

The district court acknowledged the sincerity of the department's fears, but found the experts divided on the effect of a union and that there was "not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institution." Id. at 124. Finding that the Department had not established that the activity was determental to proper penological

objections, the district court gave judgment to the union.

The Supreme Court rejected this analysis and reversed. Quoting Price v. Johnston, 334 U.S. 266, 285 (1948), the Court reemphasized generally that "[l]awful incarceration brings about the necessary withdrawl or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Jones at 125. It then addressed specifically the perspective a district court must adopt in reviewing allegations of constitutional violations by prisoners:

> Without a showing that [the motivating beliefs of the Corrections Department] were unreasonable, it was error for the District Court to conclude that [the Department] needed to show more.

> In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order." [409 F.Supp.,] at 944-945. Rather, "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Pell v. Procunier, 417 U.S., at 827.

Id., at 128-129. On the Union's first amendment claims, the Court concluded, "It is enough to say that [the Department has] not been conclusively shown to be wrong in this view." Id., at 132. On the equal protection claims, it added, "Thus, [the Department officials] need only demonstrate a rational basis for their distinctions

between organizational groups." Id., at 134.

Jones plainly places the burden on challengers; they must demonstrate that the justification offered by prison officials is wholly lacking in reason.

Jones was followed by Bell v. Wolfish, 441 U.S. 529 (1979), which reversed a district court decision ordering multifold changes in the way federal authorities operated the New York Metropolitan Correctional Center. Again the court emphasized that the challengers had "not met their heavy burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices." Id., at 562. The

Court quoted and followed the principles discussed in Jones.

Since Bell, the U. S. Court of Appeals for the Sixth Circuit has twice applied the principles of Jones and Bell in cases involving the exercise of religion within prisons. First, in dicta, in Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981), the court said, "It is settled that a prisoner does not have an absolute right to practice his religion in accord with his desires. The needs of the institution and penological objectives must be balanced against the right of the individual prisoner." Citing Pell v. Procunier, 417 U.S. 817 (1974) and Jones. In Jihaad the prisoner was seeking damages for discipline he suffered after

refusing to shave a beard required by his Sunni Muslim faith.

The second case, Weaver v. Jago, 675 F.2d 116 (6th Cir. 1982), struck a cautioning note against too much deference and emphasized what appears at least in the background of the Supreme Court's discussions: even though deference is accorded the Prison, the court must still find that the rules further security and are not an exaggerated response. In Weaver the prison had disciplined a young Cherokee Indian for refusing to cut a braid he claimed had religious significance. The prison had done no more than state that the rule furthered security and good order; it had not explained the connection.

In this case the Prison fears

that allowing worship services could exacerbate the already acute problem of homosexual violence in the Prison. Both sides have presented considerable and diverse testimony on the effect of services by a recognized homosexual church. One point that witnesses on each side agreed on, however, is that the peculiarly violent brand of homosexuality in prisons is a very dangerous problem. Ruth Rushen, the Director of the California Department of Corrections, testifying for plaintiffs on the effect of the Church's services in two California prisons, admitted that homosexuality required special consideration. She described the elaborate security measures the California prisons had adopted to isolate predatory prisoners who

would take advantage of weaker men. (Tr. II. 34.) Particularly aggressive inmates are transferred to the Medical Facility at Vacaville where security is greater. If there they still pose a problem, the prison isolates them in management control divisions and may transfer them to the maximum security prisons at San Quentin and Folsom. (Tr. II. 25-33.) She candidly offered that without the federal district court's order in Lipp v. Procunier, 402 F. Supp 623 (N.D. Calif. 1975), the California Department of Corrections probably would not have allowed the Church to conduct congregate services. (Tr. II. 37-38.)

The Regional Administrator and Warden of Jackson, Dr. Barry Mintzes, and the Superintendent of the

Reception and Diagnostic Center at Jackson, Dr. John Prelesnik, were far more graphic in their descriptions of the problem. Both men are trained psychologists with years of experience in treating prisoners and in prison administration. Dr. Mintzes has served almost a dozen years with the Department of Corrections in Michigan, much of that time either as the chief psychologist at Jackson Prison or as its warden. (Tr. 193-195.) Dr. Prelesnik has worked in the Reception and Diagnostic Center for at least six years, the last five as supervisor.

The picture they draw of homosexuality in prison is in stark contrast to the life of homosexuals outside of prison. Homosexuality

in prisons is more than anything else an act of violence and a display of machismo. Predatory inmates who may not even be homosexual out of prison take advantage of weaker or effeminate prisoners as a way of establishing their supremacy in the prison pecking order. (Tr. 197, 307-310, 314.) True homosexuals are in fact looked upon with disdain. (Tr. 314.) Weaker inmates, perhaps desiring affection in the hostile prison environment, may seek the protection of stronger patrons. They become the subject of love triangles, jealousies and often end up as prostitutes or the victims of rapes and even murder. During the six and one-half years before the Church requested recognition by the Prison, there had been twenty-six violent

incidents at Jackson involving homosexuality, including three murders. (Tr. 140.)

Both psychologists stated that the well adjusted homosexual inmate would probably avoid the Church's services fearing that his sexual preference would only then be discovered and that he would consequently draw the attention of the more vicious, manipulative types. (Tr. 259, 310.) Instead, they testified, the services would attract the predators, the maladjusted homosexuals and prisoners not sure of their sexual identity, frightened in the hostile culture of the institution and looking for security, compassion and possibly affection. (Tr. 197, 307, 311.) Services intended to nourish the

spirit would become opportunities where the weak would be identified and volatile liaisons could more easily be made.

It is precisely for these reasons that the Michigan Department of Corrections decided not to allow the Church to conduct its services. It wanted to prevent exposing homosexuals to violent predatory prisoners and eliminate an especially attractive opportunity for meetings.

Plaintiffs respond to defendants' fear of increased violence from two directions. First, they argue, homosexual prisoners who would participate in the Church's services might develop a more elevated self image and would as a result be better able to resist

predators and avoid unsavory relationships. Plaintiffs presented a number of witnesses, their own ministers and the ministers of other congregations who had been involved in the Church's services in California. All testified that the prisoners who had participated, though not necessarily solely in worship, did appear to become better adjusted. Drs. Mintzes and Prelesnik admitted the possibility. (Tr. 243.)

I find Dr. Mintzes' response to the argument conclusive, however. Asked whether he did not see that a better self image might be an effective shield, he responded: "I don't believe their self image would have anything to do with dealing with this. You can have the best image in the world and five people jump

you -- you can have the best self image and still be just as vulnerable .... I would say to the extent they are able to conduct themselves in a secure fashion and not allow themselves to be identified or preyed upon, I would say, to that extent, they would be effective to the extent that homosexuals are effective now." (Tr. 243-244.)

Plaintiffs' second approach in form is stronger. They attempt to show defendants' fears groundless by presenting evidence that services conducted in similar prisons in California did not produce the predicted increase in violence. Following entry of a negotiated agreement in 1976, Lipp v. Procunier, 402 F.Sup 623 (N.D. Calif. 1975), the California Department of Corrections

allowed the Church to conduct worship services at two of its facilities: the California Men's Colony at San Luis Obispo, and the California Medical Facility at Vacaville. Both facilities are medium security. Plaintiffs called Ruth Rushen, the Director of the California Department of Corrections. She testified that, "The Church is operating very well. There have been no incidents of violence or there haven't been any incidents of pressuring or anything like that. The Church is going along like all the other Churches." (Tr. II, 8.)

Though this response might be effective to rebut the fears of some prisons, I find in this case that it fails because of the wide differences between Jackson Prison and the

California prisons, both in their physical arrangement and in the way they are run. The two California prisons are designed in much the same way: housing units of three floors each connect to a single main hall. The housing units contain approximately 100 cells over the three floors and approximately 100 inmates live in each unit. (Tr. II. 9-11.)

Jackson Prison, on the other hand, has cell blocks with five open, tiered galleries. The north complex houses seven hundred men, the central three thousand, and the south one thousand five hundred.[3]

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[3] There is a fourth complex, the Reception and Diagnostic Center, which houses only temporarily about 450 prisoners. No congregation conducts services in this complex.

Obviously, security is more easily maintained in the California units where fewer inmates occupy separate floors and the cells themselves are more easily guarded. Asked which prisons in California most resembled Jackson's configuration, Ms. Rushen said Folsom and San Quentin, the two maximum security prisons for which, she testified, the Department could make a good case for not allowing services. (Tr. II. 39.) She did say that all political considerations aside, she personally would be willing to allow services even at those prisons. Her other testimony casts serious doubt on the soundness of that judgment, however. Ms. Rushen repeated a number of times that services did not cause problems

where they are held only because predatory inmates were constantly being removed and isolated in more secure places, ultimately to Folsom and San Quentin. The preconditions for safe services at Vacaville and San Luis Obispo thus do not exist at San Quentin and Folsom.

California's rigorous program of isolation is the second way in which that system differs from Jackson Prison. In California, predatory inmates cannot cause serious problems because as soon as they are exposed, they are transferred to increasingly more secure prisons. Troublemakers at the Men's Colony are transferred first to an isolated management control wing, from there to the Medical Facility, and finally to Folsom or

San Quentin. Ms. Rushen, as I have indicated, attributed the safe introduction of services to this program. (Tr. II. 35-36.)

Dr. Mintzes testified that the design of the Prison, particularly its large cell blocks, make close supervision difficult even in the medium security complexes. The central close security complex would, of course, be the final location for the violent inmates in any case and would, therefore, be as uncontrollable as Folsom or San Quentin.

In conclusion, I do not find that the Michigan Department of Corrections acted unreasonably or overreacted when it prohibited congregate worship services by the Metropolitan Community Church. All agreed that

homosexuality in prisons is a serious problem, being primarily a vehicle for the display of machismo and a tool in the inmate power structure. Nor can anyone deny that persons attending services would most likely be exposing themselves as homosexuals and, therefore, possible victims of aggression. Plaintiffs have not rebutted this prediction, one I add that must be granted great deference. The experience in California, because of the differences in the institutions, does not provide a sound test of the effect of services at Jackson. In addition, plaintiffs' speculation that a better self image might protect one from aggression is out of touch with the

hostile reality of prison life.

Judgment must, therefore, go to defendants. An appropriate order follows.

/s/ JOHN FEIKENS
Chief United States District Judge

Dated; September 15, 1982
Detroit, Michigan

Office-Supreme Court, U.S.
FILED
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CLERK

No. 84-1029 (2)

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUAN INOSENCIO, et al,

Petitioners,

v

PERRY JOHNSON, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE LAW CONCERNING FIRST AMENDMENT AND EQUAL PROTECTION RIGHTS OF PRISON INMATES HAS BEEN SETTLED BY THIS COURT, AND NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

II.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE PETITION SEEKS REVIEW OF THE EVIDENCE AND FINDINGS OF FACT.

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No. 84-1029

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JUAN INOSENCIO, et al,

Petitioners,

v

PERRY JOHNSON, et al,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves a challenge to the Michigan prison officials' ban on congregate worship services at the State Prison of Southern Michigan, by the Detroit Metropolitan Community Church.

The Detroit Metropolitan Community Church attempts to meet the spiritual needs of homosexual persons, including those who are incarcerated. The church was recognized as representing a bona fide religion by prison officials in 1976, and was allowed to meet with inmates on an individual basis and to mail religious literature to them (Court of Appeals Opinion of September 11, 1984, page 2, Petitioner's Appendix).

However, because the prison officials believed that group worship services for homosexual inmates at the State Prison of Southern Michigan prison facility would constitute a threat

to prison security, a ban on congregate services was imposed (*Id*).

Considerable testimony was presented in 1982 in the District Court following a remand in a prior appeal (*Inosencio* v *Johnson*, 658 F2d 418 (6th Cir, 1981). On remand prison officials established the factual basis for their conclusion that security would be threatened by allowance of congregate worship services for homosexual inmates (Court of Appeals' Opinion of September 11, 1984, at pages 6-7; District Court Opinion of September 15, 1982, at pages 15-23, Petitioner's Appendix).

Petitioners attempted to demonstrate, through testimony from Ruth Rushen (Director of the California Department of Corrections), that congregate worship services for homosexual inmates had not led to increased security risks at certain prison facilities in California, therefore the Michigan prison officials' ban constitutes an exaggerated and unfounded response (District Court Opinion, at pages 23-24).

However, the testimony of Ruth Rushen was rebutted by testimony demonstrating substantial differences between the California prison facilities and the one Michigan facility which was the subject of this lawsuit (State Prison of Southern Michigan) (*Id.* at pages 24-28). Even Petitioners' witness (Rushen) admitted that a security threat could be demonstrated at the California facilities (Folsom and San Quentin) most comparable to the Michigan facility (State Prison of Southern Michigan) (*Id* at page 26).

Because of the substantial factual basis supporting the prison officials' belief that prison security would be threatened by congregate worship services for homosexuals, and the obvious factual dissimilarity between the attempted comparison of the California facilities which allow group services for

homosexuals and the one Michigan facility (SPSM) which did not, the District Court granted final judgment to the Respondents and the Sixth Circuit affirmed that judgment.

REASONS FOR DENYING THE WRIT

I.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE LAW CONCERNING FIRST AMENDMENT AND EQUAL PROTECTION RIGHTS OF PRISON INMATES HAS BEEN SETTLED BY THIS COURT, AND NO CONFLICT EXISTS AMONG THE COURTS OF APPEALS.

This Court's decisions pertaining to the First Amendment and Equal Protection rights of prisoners are not in short supply. Cases such as *Bell* v *Wolfish,* 441 US 520 (1979), *Pell* v *Procunier,* 417 US 817 (1974), *Cruz* v *Beto,* 405 US 319 (1972), and *Jones* v *North Carolina Prisoners Labor Union, Inc.,* 433 US 119 (1977), and more recently *Hudson* v *Palmer,* —— US ——; 104 S Ct 3194; 82 L Ed 2d 393 (1984), have made the contours of prisoner rights relatively clear. While prisoners retain certain constitutional rights, those rights must be balanced with the prison officials' goals of maintaining security and preserving internal order and discipline.

The prison officials' goal of maintaining prison security and discipline has been recognized by itself as a compelling state interest. See *Lipp* v *Procunier,* 395 F Supp 871 (ND Cal, 1975). The prison officials in the present action established factually that there was a substantial basis for their judgment that the ban on homosexual congregate worship services was necessary to maintain prison security and discipline. Obviously, Petitioner disagrees with that factual find-

ing and now asks this Court to grant the Petition for Writ of Certiorari for legally insufficient reasons.

Petitioner contends that certiorari is appropriate because there exists a conflict among a 1975 three-judge District Court for Northern California (see *Lipp* v *Procunier, supra*) and the decision below. This contention is specious when the decisions are subjected to even cursory review. In *Lipp* v *Procunier, supra,* the court, after first establishing that the church espoused and taught a bona fide religion (which was not an issue in this case), proceeded to the issue which is the essence of this case: whether the prison authorities' restriction on homosexual congregate worship services was reasonable and necessary in the administration, maintenance of discipline and control of dangers and hazards presented. *Cruz* v *Beto, supra,* was primarily relied upon for the above proposition. *Lipp* v *Procunier, supra,* at 877.

The *Lipp* court said that the appropriate test:

> ". . .requires the prison authorities to show that the Ban subjugating the freedom is reasonably necessary to promote a 'compelling state interest.'"
>
> *Id.* at 877.

Furthermore, the court in *Lipp* v *Procunier, supra,* made it clear that the:

> ". . .orderly administration of the penal laws of a given state, which necessarily includes *an orderly administration of prison population and control of hazards and dangers to inmates and property is of itself indisputably a compelling state interest of that state.*" (Emphasis added).
>
> *Id.* at 877.

Finally, since this issue was in the words of the *Lipp* court a question of fact, the court could not render a decision on this issue until further evidence was developed. The court made the following observation:

> "Whether the proclivities, habits or inclinations of an individual or group of prison inmates to act present a clear and present danger to prison discipline and control of prison safety to persons and property is a question of fact; first, to be determined and asserted by prison authorities, and second, if contested, by appropriate fact finding procedure. *By the very nature of an orderly prison population, the expertise of prison officials must be given more than mere credibility and deference.*" (Emphasis added).
>
> *Id.* at 877.

There was never a subsequent evidentiary hearing in *Lipp* on this issue. Instead, the prison authorities negotiated a consent judgment without admitting liability. *Lipp* v *Procunier*, 402 F Supp 623 (ND Cal, 1975).

When the first appeal in the present case was taken to the Sixth Circuit, the Court vacated the District Court's summary judgment in the Defendants' favor and said:

> "In this appeal plaintiffs contend that the district court erred in granting summary judgment. We agree. In *Lipp* v *Procunier*, 395 F.Supp 871 (N.D.Cal.1975), a case which involved similar issues, a three-judge district court denied a similar summary judgment motion. In this case the plaintiffs should be given an opportunity to present evidence concerning the effect of the church's congregational services in prison and on the treatment of the church's ministers in prison.
>
> *Inosencio* v *Johnson*, 658 F 2d 418, 419 (6th Cir, 1981).

Obviously, the Court of Appeals did not shun the *Lipp* decision, but rather accepted the propositions set forth in the decision and remanded for fact-finding purposes. In *Lipp* there was no evidentiary record. In this case there is. There simply is no basis for the Petitioner to assert that a conflict exists among the Courts of Appeals, at least with respect to the *Lipp* decision and the instant petition. That Petitioner disagrees with the factual findings reached by both courts below does not, as shown in the next argument, provide a sufficient basis to have this Court review the present case.

II.

THE GRANTING OF CERTIORARI IS INAPPROPRIATE WHERE THE PETITION SEEKS REVIEW OF THE EVIDENCE AND FINDINGS OF FACT.

It appears that the Petitioner wishes this Court to ignore the well established principle that the United States Supreme Court does not grant certiorari to review evidence and discuss specific facts. *United States* v *Johnston*, 268 US 220, 227 (1925).

As previously indicated in the counterstatement of facts, Respondents ultimately prevailed because of the *facts* that were established at the evidentiary hearing. These facts were deemed sufficient by the fact finder (the District Court), to establish that the ban imposed on congregate worship services was necessary to prison security, discipline and safety of the inmates and was neither unreasonable nor exaggerated (District Court Opinion at pages 28-30; Court of Appeals' Opinion of September 11, 1984, at page 7).

Petitioner devotes considerable attention in his Petition to testimony from his witness which supposedly demonstrates

that the facts and the record are somehow insufficient to support the legal conclusions reached. However, it is evident that the factual findings made in this case are sufficient to withstand any test Petitioner advances because:

1. prison security, discipline and safety is a question of fact.

2. The ". . .orderly administration of prison population and control of hazards and dangers to inmates and property is of itself indisputably a compelling state interest of that state;" and,

3. ". . .the expertise of prison officials must be given more than mere credibility and deference."

Lipp v *Procunier*, at 877.

Finally, the Petitioner suggests that the issue involving state preference of one denomination over another was also erroneously decided, contending the facts in this case really support a different conclusion than that reached by the District Court and the Court of Appeals. (See pages 22 and 23 of Petition). Once again, the Petitioner improperly suggests that his interpretation of the facts — which both the District Court and Sixth Circuit rebuffed — somehow provides a basis for second-guessing by this Court.

CONCLUSION AND RELIEF SOUGHT

Because of the absence of a substantial question of law or conflict among appellate panels, as well as the obvious attempt to seek review of factual findings to which the Petitioner disagrees, the present Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: January 25, 1985